IN THE

Supreme Court of the United States

October Term, 1979

No. 79-346

WALTER F. KERRIGAN,

Petitioner,

vs.

FAIR EMPLOYMENT PRACTICE COMMISSION OF THE STATE OF CALIFORNIA and CITY OF SAN DIEGO, CITY ATTORNEY'S OFFICE,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of California

PETITIONER'S REPLY BRIEF

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INTRODUCTION

This reply brief is in response to the brief of the Fair Employment Practice Commission of the State of California in opposition to the Petition for Writ of Certiorari.

ARGUMENT

Not only were constitutional issues raised by Petitioner, but also the decision (Petition for Certiorari; Appendix B) ruled that where constitutional rights are involved, the courts are better equipped to perceive and defend those rights than are administrative agencies.

On B-9 the court stated:

"In decreeing a strict judicial scrutiny in the analogous area of sex discrimination in employment, the California Supreme Court in *Sail'er Inn, Inc. v. Kirby,* 5 Cal.3d 1, 17, discussed the fundamental aspects of employment and equal employment opportunity:

> 'The right to work and the concomitant opportunity to achieve economic security and stability are essential to the pursuit of life, liberty and happiness. As early as 1915, the United States Supreme Court declared that 'the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of [the Fourteenth] Amendment to secure.' [Citation.] The California Legislature accords statutory recognition to the right to work by declaring the opportunity to seek, obtain and hold employment without discrimination a civil right. [Citation.] Limitations on this right may be sustained only after the most careful scrutiny. [Citations.]'"

On B-10:

"We conclude equal employment opportunity is fundamental to the individual in economic and human terms and in the totality of the life situation. Thus, equal employment opportunity qualifies as a fundamental right for the purpose of fuller judicial review of administrative agency decisions."

And B-11:

"Similarly, where the action of an administrative agency infringes constitutinally-granted rights, independent judicial review must be invoked. In *Adcock v. Board of Education,* 10 Cal.3d 60, the Supreme Court imposed review by independent judgment where a teacher claimed that his transfer to another school was a penalty given him for exercising first amendment rights. The court stated:

> '[I]t has been essential to adopt a special rule or standard to review administrative decisions when constitutional rights are assertedly limited [citations]. . . ." (*Id.* at pp. 65-66.)

While the court did not use the "fundamental vested right" language, the essential concept is the same.[2]/ The courts have a duty to protect constitutional or fundamental rights from infringement by administrative agencies. The courts, not the administrative agency, have the valuable expertise, the broad background and constitutional foundation necessary to perceive and defend constitutional and fundamental rights from a balanced perspective. A line, carefully drawn between the subjects over which the agency has important expertise and the areas of quasi-judicial decision-making over which the courts have superior knowledge and background, point to the

independent judgment standard where constitutional rights are circumscribed.'"

The record in the Superior Court (C.T. pp. 13-14) stated:

"8. RIGHT TO PURSUE A LAWFUL BUSINESS OR OCCUPATION IS A FUNDAMENTAL VESTED RIGHT

Purdy & Fitzpatrick v. State of California (1969) 71 C2d 566, 579; 7a Cal. Rptr. 77 A L.R. 3d 1194 Stated:

"Labor Code Section 1850 discriminates on the basis of alienage and as such classification involves a strict standard of review. Moreover, the state may not arbitrarily foreclose to any person the right to pursue an otherwise lawful occupation. Any limitation on the opportunity for employment impedes the achievement of economic security which is essential for the pursuit of life, liberty and happiness; courts sustain such limitation only after careful scrutiny.'

Also *Truax v. Raich* (1915) 239 U.S. 33. And *Northern Inyo Hospital V. Fair Employment Practice Commission, supra.*"

And (C.T. pp. 14-15):

"In *Fitzpatrick v. Bitzer, Chairman, State Employment Retirement Commission* (June 28, 1976) U. S. Supreme Court, B 3995 CCH. It was decided that present and retired male employees of the State of Connecticut are not barred by the Eleventh Amendment of the U.S. Constitution from being awarded backpay and attorney fees, since that Amendment, and

the principles of state sovereignty that it embodies is limited by the enforcement provisions of paragraph 5 of the Fourteenth Amendment, which grants Congress authority to enforce "by appropriate legislation" the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority."

(C.T. pp. 30-32):

"22. CALIFORNIA FAIR EMPLOYMENT COMMISSION CANNOT DENY ANY PERSON THE EQUAL PROTECTION OF THE LAW.

California has always attempted to prevent some group from earning a livelihood by denying them due process of law, and the Bicentennial year 1976, is no exception to this policy.

In *Yick Wo v. Hopkins* (1886) 118 U.S. 356, a San Francisco municipal statute, ostensibly a safety measure prohibiting laundry businesses in a wooden buildings. The law itself was fair in its face and impartial in appearance, yet, it was applied and administered by public authority with an evil eye and unequal hand, so as to discriminate against Chinese and prevent them from their natural right to earn a living in laundries while permitting other not Chinese to carry on the same business under similar conditions. The United States Supreme Court recessed the Supreme Court of California and found a violation of the Fourteenth Amendment to U. S. Constitution, and permitted the Chinese to carry on in the accustomed manner, their harmless and useful occupation, in which they depend for a living.

In 1945 California passed a law that banned issuance of fishing licenses to any person ineligible to citizenship. TAKAHASHI, a California resident since 1907, brought action

in Superior Court of Los Angeles for mandamus to compel the Commission to issue a license to him. The court granted the petition for mandamus. The California Supreme Court reversed. The United States Supreme Court held statute is but one more manifestation of the anti-Japanese fever which has been evident in California in varying degrees since the turn of the century. The United States Supreme Court found that it need but unbutton the seemingly innocent words of the statute to discover beneath them the very negative of all the ideals of the equal protection clause of Section 1 of the Fourteenth Amendment to U. S. Constitution. *Takahashi v. Fish and Game Commission* (1948) 334 U.S. 410.

Now in 1976, we have the respondent, an agency of State of California, refusing to enforce the age discrimination laws and they are denying petitioner and all residents of the State over 40 the equal protection of the laws."

(C.T. pp. 75-76):

"*Purdy & Fitzpatrick v. State of California,* 71 C2d 566, 579, ruled on an act that prohibited employment of aliens on public works, 'Moreover, the state may not arbitrarily foreclose to any person the right to pursue an otherwise lawful occupation. Any limitation on the opportunity for employment impedes the achievement of economic security.'

And Petitioner cited in (Appellant's Opening Brief) pages 14-15 *Davis v. Passman,* (CA. 5, 1977) 14 FEP Cases 177, that mentioned recent Supreme Court decisions established beyond dispute that, just as sex discrimination by states violated the Fourteenth Amendment unless supported by sufficient justification, is applied to the federal government by the Fifth Amendment.

The brief stated on page 14 ". . . employee has the right to a remedy under the Fifth Amendment's equal protection guarantee." And on page 15, "Declaring that congressional representatives are 'never above and beyond the law,' the court stresses that the Constitution ensures individual rights even against the mighty."

The brief page 16 stated:

> "The FEPC ignored its own rule 307(d) and also Labor Code 1426 and denied Kerrigan the equal protection of the laws and procedural due process in violation of his Constitutional rights."

Petitioner (Appellant's Closing Brief, page 2) said:

> "On appeal Kerrigan alleged on appeal a violation of his constitutional rights guaranteed by the Fourteenth Amendment because the FEPC ignored its own rules and a mandatory State law requiring notice of judicial review."

And on pages 4 and 5:

> "City is a public agency entrusted with public responsibilities to enforce the law, but does not believe that it is the fundamental vested right of every individual in San Diego to have equal employment opportunity. The Fifth and Fourteenth Amendments guarantee to every person equal protection. 'Equal protection' concepts are an inherent part of 'due process'. What can be a more fundamental vested right of 'any person' than due process?"

The decision in the case at bar (Appendix B-4) raised the issue of the privileges and immunities clause, Article IV:

> "Shaffran suspected Kerrigan may have come to San Diego to retire. . . ."

Petitioner (Petition For Hearing In The Court Of Appeal, p. 11) said:

> "7. VIOLATION OF KERRIGAN'S FUNDAMENTAL RIGHT TO LIVE WHERE HE WANTED TO LIVE.
>
> Shaffran advised not to employ Kerrigan as he might have come to California to retire. This violated Kerrigans right to live where he wanted to live, *Barrick Realty v. City of Gary,* 354 F.Supp. 126 (N.D. Ind. 1973)."

Petitioner (Petition For Hearing In The Supreme Court Of California, p. 7) stated:

> "1. RIGHT TO FOLLOW ONE'S LEGITIMATE OCCUPATION IS A RIGHT IMPLICIT IN THE FOURTEENTH AMENDMENT.
>
> The denial of equal employment opportunity by a state agency is an unconstitutional violation of the equal protection of law.
>
> In *Truax v. Raich,* 239 U.S. 33 (1915) the Supreme Court found an Arizona law restricting employment to be unconstitutional, holding, inter alia, that:
>
> > "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was

> > the purpose of the Fourteenth Amendment to secure."

The above statement was cited with approval in *Hampton v. Mow Sun Wong,* 426 U.S. 88, 102-103 (1976).

The right to equal employment is a large ingredient in the civil liberty of the citizen as noted in *Butchers' Union v. Crescent City Co.,* 111 U.S. 746, 760 (1884):

> "The right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal, that they are endowed by their Creators with certain inalienable rights; that among these are life, liberty and the pursuit of happiness."

And in *New State Ice Co. v. Libermann,* 285 U.S. 262, 278 (1932); *Corey v. City of Dallas,* 352 F.Supp. 977, 980 (N.D. Tex. 1972). "The right to earn a livelihood by following one's legitimate occupation is a right implicit in the Fourteenth Amendment."

Respectfully submitted,

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